

LIBRARY
SUPREME COURT U. S.

FILED
DEC 3 1973
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-363

FRANKLIN NIX,

Petitioner

versus

THE GRAND LODGE OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,

Respondent

Petition for Rehearing of Order Denying Petition for Writ of Certiorari

WILLIAM G. McRAE
608 Lakeshore Drive.,N.E.
Atlanta, Georgia 30307

Attorney for Petitioner

INDEX

PAGE NO.

Petition for Rehearing of Order Denying Petition for Writ of Certiorari---------- 1

Conclusion---------- 8

Certificate of Service-------- 9

AUTHORITIES

Edward B. Marks M. Corp. v Charles K. Harris M.P. Co., (2nd Cir. 1958) 255 F. 2d 518, 522, cert. denied 358 U.S. 83---------- 7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-363

FRANKLIN NIX,

Petitioner

v.

THE GRAND LODGE OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,

Respondent

Petition for Rehearing of Order Denying Petition for Writ of Certiorari

---

TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Comes now Franklin Nix, within 25 days from the date of the order denying his petition for a writ of certiorari entered on November 12, 1973, and respectfully petitions the Court for a rehearing of his

petition for writ of certiorari in the above stated case, because of intervening circumstances of substantial or controlling effect with respect to the record certified and transmitted to this Court by the clerk of the court below, contrary to the provisions of Rule 21 (1) and (2) of the Rules of the Supreme Court.

Rule 21 (1) and (2) read as follows:

> "1. A party intending to file a petition for certiorari may, prior to filing the case in this court or at any time thereafter prior to action by this court on the petition, request the clerk of the court possessed of the record to certify it, or any part of it, and to provide for its transmission to this court, but the filing of the record in this court is not a requisite for docketing the petition. If the petitioner has not done so, the respondent may request such clerk to certify and transmit the record or any part of it. Thereafter, the clerk of this court or any party to the case may request that additional parts of the record be certified and transmitted to this court. A copy of all requests for certification and transmission shall be sent to all parties to the proceeding.

> "2. When requested to certify and transmit the record, or any part of it, the clerk of the court possessed of the record shall number the documents to be certified and shall transmit with the record a numbered list of the documents, identifying each with reasonable definiteness. If the record has been printed for the use of the court below, such printed record plus the proceedings in the court below may be certified as the record unless one of the parties or the clerk of this court otherwise requests. The provisions of Rule 12 (3) with respect to original papers shall apply to all cases sought to be reviewed on writ of certiorari."

The petition for writ of certiorari was docketed in this Court on August 28, 1973. On September 22, 1973, petitioner's counsel wrote a letter to the clerk of the court below requesting him to certify and transmit parts of the record to this Court and a copy of said request was sent to counsel for respondent. Instead of complying with said request said clerk by letter to petitioner's counsel, dated September 25, 1973, stated:

> "Under revised Rule 21 (1) of the Supreme Court effective July 1,

> 1970, a record is no longer required in connection with an application for writ of certiorari, and therefore, will not be routinely prepared by this office. 38 LW 3502."

On September 28, 1973, petitioner's counsel wrote another letter to said clerk requesting that he certify and transmit parts of the record to this Court, and sent a copy of said request to counsel for respondent. Copies of this correspondence were sent to the clerk of this Court with a letter of transmittal on September 28, 1973, by counsel for petitioner. Neither the respondent nor the clerk of this Court, so far as petitioner or his counsel is informed, requested the clerk of the lower court to certify and transmit additional parts of the record to this Court.

It was the duty of the clerk of the court below under Rule 21 (2) to certify and transmit only those parts of the record requested by counsel for petitioner, in the absence of a request to him by respondent or the clerk of this Court that additional parts of the record be certified and transmitted to this Court.

Instead of complying with the request of counsel for petitioner to certify and transmit only those parts of the record specified, the clerk of the lower court

wrote a letter to the clerk of this Court, dated October 17, 1973, transmitting several volumes as the certified transcript of record, and which stated falsely that they were sent "Pursuant to the request of counsel for petitioner".

On October 22, 1973, counsel for petitioner wrote a letter to the clerk of this Court, a copy of which was sent to the clerk of the lower court, in which counsel stated:

> "The letter to you from the Clerk of the United States Court of Appeals for the Fifth Circuit, dated October 17, 1973, again shows a failure to certify and provide for the transmission to the Supreme Court of only certain parts of the record in that court, as specified in my request to him."

Petitioner respectfully urges that the clear violation of this Court's rules by the clerk of the lower court in the certification and transmittal of the record to this Court on his petition for a writ of certiorari, is of sufficient gravity and importance as to require the exercise of this Court's power of supervision to enforce its own rules designed to insure fairness to litigants who rely upon such rules in seeking a review.

Counsel seeking a review are not unmindful of the statistics that reveal the grant of review by this Court of approximately 250 cases out of approximately 4000 applications for review filed annually.

All lawyers have been informed by members of this Court of its work load, and of the limited time it can devote to an application for review. Counsel seeking a review, which depends wholly upon the Court's discretion, are advised by its rules that only those parts of the record deemed essential to a determination of whether a case should be reviewed on its merits should be certified and transmitted to this Court. Counsel for petitioner requested that only parts of the record he thought essential to such determination be certified and transmitted.

The record sent to this Court by the clerk of the lower court does not contain the "Brief for Plaintiff with attachments, filed March 1, 1972" in the district court, which petitioner's counsel requested the clerk of the lower court to certify and transmit to this Court. This brief was omitted from the printed record in the court below but was filed therein in its original form. On page 5 of said brief we said:

> "When the court declares the constitutional provision here

> in controversy to be of no force or effect with respect to union members within the United States, it would be appropriate for the court"

to grant injunctive relief, award attorney's fees and expenses of this litigation, and money damages. Such further relief petitioner was entitled to seek for himself and other members of the class, based upon such declaratory judgment, when granted, under 28 U.S.C. § 2202. Edward B. Marks M. Corp. v Charles K. Harris M. P. Co., (2nd Cir. 1958) 255 F. 2d 518, 522, cert. denied 358 U.S. 83)

The court below erroneously held that "All damage claims for Nix himself were clearly dropped at pre-trial conference." (App. 123) The pre-trial order of January 21, 1972, made no reference to Nix's claim for damages against respondent Grand Lodge. The only reference to damages in said pre-trial order reads:

> "The above case is again before the court for consideration of plaintiff's claims under his right to amend, and his claim for damages against the local union for his expulsion from membership. Plaintiff's counsel states that plaintiff abandons his claims for damages against the local union." (emphasis supplied)

The amendment setting up the class claims was filed subsequent to the entry of said pre-trial order, which granted petitioner's right to amend. The amendment was filed February 8, 1972 pursuant to the terms of the pre-trial order. The pre-trial order did not preclude petitioner from seeking all appropriate further relief for himself and other members of the class based upon the declaratory judgment subsequently granted.

Petitioner contends that the failure of the clerk of the court below to perform his duty under Rule 21 (2), as hereinbefore pointed out, and his certification and transmission of an unauthorized record to this Court in violation of said Rule, are intervening circumstances since the docketing of the case of substantial or controlling effect in influencing this Court to deny the petition for a writ of certiorari in this case.

Petitioner respectfully requests the Court to grant a rehearing of its order denying the petition for a writ of certiorari, entered November 12, 1973, and that the Court prior to action on the petition, require the clerk of the court below to certify and transmit to this Court only those parts of the record specified in petitioner's request of September 28, 1973, and that the Court upon such rehearing

grant the writ of certiorari.

Respectfully submitted,

William G. McRae

Attorney for Petitioner

Address:

608 Lakeshore Drive, N. E.
Atlanta, Georgia 30307

CERTIFICATE OF COUNSEL

I, William G. McRae, counsel for petitioner Franklin Nix, hereby certify that the above and foregoing Petition for Rehearing of Order denying Petition for a Writ of Certiorari is presented in good faith and not for delay. I also certify that the petition is restricted to intervening circumstances of substantial or controlling effect which have intervened since the docketing of the petition for a writ of certiorari in this Court.

This 28th day of November, 1973.

William G. McRae
Counsel for Petitioner

PROOF OF SERVICE

I hereby certify that I have this day served three printed copies of the above and foregoing petition upon the respondent by depositing same in a United States post office, with air mail postage prepaid, addressed to Bernard Dunau, 912 Dupont Circle Building, N. W., Washington, D. C. 20036, Lead Counsel for respondent, and that all parties required to be served have been served.

This _____ day of December, 1973.

_____

William G. McRae
Counsel for Petitioner